Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

EX PARTE OF TWILIO INC.

Dated: December 7, 2017

Twilio Inc. ("Twilio") submits this ex parte in response to the Federal Communications Commission's Draft Declaratory Ruling, Report and Order, and Order on WC Docket No. 17-108, FCC-CIRC1712-04.

We wish to make four brief points.

First, Twilio emphatically agrees that over the past decade we have seen "massive investment and innovation by both ISPs and edge providers, leading to previously unimagined technological developments and services.[1]" While this eloquent assessment of the current state of technology is aimed at bolstering support for the supposed light-touch Title I regulatory framework established in post *Brand-X*, Twilio counters that the success of innovators such as Twilio is in large part due to the assumption of the ultimate implementation of and subsequent adoption and upholding of the existing competitive framework.

The massive investment in technology and the success of companies like Twilio and the businesses whose communication we power has been fostered by a communications environment that has, for over a decade, operated under the assumption of established bright line rules. These core assumptions of no blocking and no throttling have been in effect either by Commission rule or by voluntary agreement of the ISPs and carriers, for over a decade. What is unknown is what will happen when those rules are taken away from the competitive framework.

Twilio's development and ability to support more than a million software developers, more than 46,000 businesses, and more than 1,000 nonprofits and social enterprises, is a testament to such a competitive framework. Twilio's programmable communications cloud that allows software developers to embed programmable voice, text, video, chat, wireless and fax into their applications speaks to the convergence and increasing interconnectedness of the modern communications ecosystem.

The rollback of the Open Internet Order and the resulting impact it will have on the current state of competition is particularly troubling because it reverses effective and straightforward prohibitions in favor of allowing carriers to pick winners and losers in innovation, discriminate on traffic, and prioritize their own competing services over those of other providers. These behaviors are not merely theoretical harms, they are well documented in the context of text messaging.

Second, while the declaratory ruling is extensive in its articulation of services offered by voice providers (i.e. common carriers are subject to Title II) and the reclassification of broadband ISP

[1] See p. 8 of the Draft Declaratory Ruling, Report and Order, and Order in the Matter of Restoring Internet Freedom WC Docket No. 17-108, FCC-CIRC1712-04

providers and their myriad services as an information service, a fundamental and important telecommunications service – text messaging – receives no mention in the order. and thus, its regulatory status and the means for consumer redress on the blocking of lawful, opted-in text messages remains in limbo.

Many modern forms of messaging utilize combinations of broadband and traditional wireline and wireless facilities. Like pure broadband services, messaging services need to be affirmatively folded into the Commission's regulatory framework to protect consumers' ability to access lawful content, and ensure that competition for messaging services can flourish.

The notion that text messaging is a core component of the Public Switched Telephone Network (PSTN) is unquestioned, and the Commission clearly asserts its authority to regulate both calls and text messages under the *Telephone Consumer Protection Act, 47 U.S.C. § 227*. Indeed, Chairman Pai's own dissent on the *Blackboard/Edison TCPA Declaratory Ruling* cites the appreciation of consumers in receiving the text messages they wanted to receive in regards to a taxi service and that such receipt should be unimpeded.[2]

Third, modifications to or a rollback of the Open Internet Order would disproportionately disadvantage innovators and new entrants to the market, and such harms are already evident in other communications mediums and directly impact consumers. The scope and volume of harms from blocking have been copiously documented, in both this proceeding and Twilio's petition on text messaging[3], and those particularly if not disproportionately vulnerable include social enterprises, non-profits, and educational and public utilities, such as those considered in the *Blackboard/Edison TCPA Declaratory Ruling*.[4]

The potential for "fierce consumer backlash" and voluntary upholding of "public commitments" by carriers are theoretical and unenforceable, and thus pose a tremendous burden on individual consumers to seek redress, rather than prevent or simply avoid, anti-competitive behavior.[5] The rollback, without a subsequent replacement enforcement paradigm, leaves the individual consumer with the responsibility to prove, document, appeal and ultimately petition for redress.

The Commission asserts individual consumers will "understand the source of any blocking or throttling" due to transparency in commercial contracts and buried in the terms of service. Yet

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[2] See Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135

[3] See Twilio Petition for Expedited Declaratory Ruling (filed Aug. 28, 2015) WT Docket No. 08-7

[4] See Blackboard/Edison TCPA Declaratory Ruling FCC-16-88

[5] See p. 149 of the Draft Declaratory Ruling, Report and Order, and Order in the Matter of Restoring Internet Freedom WC Docket No. 17-108, FCC-CIRC1712-04

the devil is in the details, particularly when the communications services now likely to be blocked or throttled are also prominently advertised as "unlimited".[6]

No amount of transparency or hypothetical peer pressure will be sufficient, particularly when the evidence of blocking is occluded by the multiple levels and parties through which an exchange passes. For example, a parent who doesn't receive an early dismissal text from a teacher will likely blame the teacher, not the wireless carrier that throttled the messaging application or blocked the text message. Under ex-ante bright line rules, such blocking is simply prohibited, and enforced, by the agency knowledgeable on the complex connections of modern utilization of the PSTN. Having the "means to take remedial action" should not require a nuanced understanding of antitrust law, or the time and legal resources to urge a Federal Trade Commission (FTC) action. Rather, the message the parent expects to receive should be delivered.

As outlined in WT 08-7, the failure of voluntary industry consensus is already present in text messaging. While the Commission deferred to the Wireless Association (CTIA) to establish consensus guidelines such as the CTIA Messaging Principles and Best Practices, no broadscale industry participation was ever offered, and the adoption of rules that excluded input from consumer groups and non-traditional service providers was met with great consternation. Simultaneously, the carriers charged with developing, adopting and implementing such guidelines still chose to develop their own processes. It's not entirely surprising that this voluntary effort now seems to be waning, and speaks to the need of FCC intervention and guidance in order to avoid harms to consumers, competition, and the functionality of the PSTN.

While the Commission's statement in the declaratory ruling "We emphasize once again that we do not support blocking lawful content, consistent with long-standing Commission policy" is admirable, it is sadly counter to the facts on the ground.[7]

Twilio estimates that more than 100 million consented text messages that consumers wanted to receive were blocked by wireless carriers in 2016 alone. Twilio estimates more than 33 million consented messages have been blocked in the last three months of 2017. While the Commission's draft ruling finds a "scarcity of actual cases of such blocking", the absence of data speaks more to the lack of transparency and obfuscation than the absence of harm.[8]

Fourth, even beyond the ongoing "telecommunications service" and "information service" distinction, the competitive framework has operated for over a decade with the express assumption – incumbents and innovators alike – that the Federal Communications Commission

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[6] Ibid p. 150
[7] Ibid p. 150
[8] Ibid p. 149

possessed and could exert ex-ante prohibitions on blocking as the primary invested power of the Commission and without distinction to channel.

While the Commission in this order declares that the *FTC v. AT&T Mobility LLC* is not pertinent to the distinction of FTC and FCC jurisdiction[9], the absence of authority for the FTC to intercede on reasonable network management and pending legal questions of common carriage exemption make the potential for blocking a consumer harm where the FTC either lacks the authority or jurisdiction to intercede.

Unless Congress determines that the FTC should enforce "reasonable network management" under the auspices of antitrust or undetectable consumer protection violations, the FCC still remains the proper agency to both prohibit and enforce the blocking of lawful content.

The Commission, irrespective of the referenced declaratory ruling, maintains the authority. Twilio agrees with the assessment of the Voice on the Net (VON) coalition that "for matters that cannot be resolved voluntarily, the Commission can use its Title I and Title III authority to impose requirements on providers of messaging services, just as it did in the 2013 Bounce-Back order and the 2014 Text-to-911 Order."[10]

While the Commission should continue to provide regulatory oversight of and enforce existing net neutrality principles, any replacement regime should codify ex ante general conduct rules that prohibit arbitrary blocking, and the Commission should clarify that blocking of lawful content is prohibited on text messaging services.

[9] Ibid p. 105

[10] See Voice on the Net Coalition ex parte presentation WT Docket No. 08-7, filed April 25, 2016